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A THOUSAND HUMILIATIONS: WHAT *BROWN* COULD NOT DO

BRYAN L. ADAMSON*

* Associate Professor of Law, Seattle University School of Law, Seattle, Washington.

I. INTRODUCTION

Even measuring the *Brown v. Board of Education* decisions[1] by the most modest standard is to acknowledge a dream not realized. While *Brown* represented, most unequivocally, a blow to segregation in public schools, some fifty years later, many public schools have become racially identifiable again. Today, 37% of African-Americans and Latinos attend schools which are overwhelmingly comprised of minorities.[2] In Detroit, 80% of the White students attend schools with only 3% African-American; 80% of African-Americans attend schools which are only 4% of White.[3] In Texas, 40% of its 1.8 million students attend "overwhelmingly" Hispanic schools.[4] In Cleveland, over half of all African-American students attended racially isolated schools in the 1970's and 1980's.[5] In 2001, that number actually *rose* to over 65%.[6]

Prior to *Brown*, the education gap between Whites and African-Americans was overwhelming. In 1950, 6.5% of America's nonwhite population had no formal education, 24.9% had completed less than five years of schooling, and over 31% were functionally illiterate.[7] Contrast that with Whites in 1950: only 2.1% had no formal education, only 6.6% had completed less than five years of schooling, and only 8.7% could be considered functionally illiterate. Today, these disparities have narrowed, but are no less distressing. According to the National Assessment of Educa-

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1. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (*Brown I*); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*).

2. Howard Manly, Op-Ed., Brown's *Forsaken Dreams: Flawed Rulings of 1954 Color Today's School*, BOSTON HERALD, May 16, 2004, at O27 (disclosing that between 90–100% of the students in these schools are minorities).

3. Ron French, Brad Heath & Christine MacDonald, *Metro Classes Remain Separate, Often Unequal: Gaps Persist in Resources, Achievement*, DETROIT NEWS, May 16, 2004, at 1A, *available at* http:detnews.com/2004/specialreport/0405/17/a01-153972.htm (discussing *Brown's* success in striking the policy of a "separate but equal" school education system, but also *Brown's* failure to integrate blacks and whites in the public school system); *see also* Scott Stephens, *Pioneering District at a Crossroads*, PLAIN DEALER (Cleveland, Ohio), May 17, 2004, at A1 (reporting that even in Charlotte—once a bright example of desegregation efforts—there has been marked re-segregation, with thirty-three percent of its schools predominately one-race).

4. Jennifer LaFleur, *Many Areas of Texas Dominated by One Ethnicity*, DALLAS MORNING NEWS, May 17, 2004.

5. Scott Stephens, *Pioneering District at a Crossroads*, PLAIN DEALER (Cleveland, Ohio), May 17, 2004, at A1.

6. Scott Stephens & Dave Davies, *66% of Cleveland Minorities Attend Racially Isolated Schools*, PLAIN DEALER (Cleveland, Ohio), May 16, 2004, at A1.

7. Carol L. Miller, *The Relative Educational Attainment of the Negro Population in the United States*, 22 J. NEGRO EDUC. 388, 389 (1953). Miller does not define "nonwhite," but states that of the numbers associated with nonwhites, the majority "are Negroes." *Id.* at 390.

tional Progress, in 2003, 65% of African-Americans in K-12 were unable to read at that their grade level, compared to 25% of Whites.[8] Over 15% of African-Americans could not read proficiently upon leaving high school.[9] Furthermore, only 50.2% African-Americans graduated from high school in four years, versus 74.9% of Whites.[10] African-American college enrollment and completion rates are similarly low. African-Americans earn only 50% of the college degrees that Whites earn. It is no mystery that educational outcomes have a significant, if not dispositive impact on earning power and sustained economic prosperity. Thus, it should come as little surprise that African-American wage earnings are only 67% of those earned by Whites.[11]

Before *Brown*, it was presumed that the primary cause for then-existing achievement gaps and the racial identity of public schools was the system of de jure segregation which relegated African-American children to inferior educational resources, high classroom populations, and racial isolation. It was the *Brown* litigation that brought those problems into relief, including the psychological damage caused by de jure segregation and its pernicious impact on academic achievement. The promise abided that public school desegregation would ensure equal, thus better educational opportunities for African-Americans. However, given the current racial make-up of public urban schools, and the persistent achievement gaps, many view the promise of *Brown* woefully unfulfilled.

It might be said that *Brown* was supposed to do two things: 1) provide immediate relief to the litigants and the school districts, and 2) provide a directive steeped in constitutional doctrine to eliminate all vestiges of segregation and discrimination in not only those schools directly involved in the litigation, but public school systems nationwide.[12] However, it quickly became clear that *Brown* could not "simply" be about *school* segregation and discrimination. To be an unmitigated success, *Brown* would have to address the segregation and discrimination that infected virtually every aspect of our country.

Brown could never do that. For all of *Brown*'s potential, it was simply incapable of addressing the myriad social, political, and economic forces

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8. George Archibald, *50 Years Later, Brown Disappoints*, WASH. TIMES, May 17, 2004, at A1, *available at* http://www.washingtontimes.com/national/20040517-124748-6802r.htm.

9. *Id.*

10. CHRISTOPHER B. SWANSON, PROJECTIONS OF 2003-2004 HIGH SCHOOL GRADUATES 11–12 (Urban Institute Education Policy Center), http//:www.urban.org/Uploaded PDF/411009_2003_04_HS_graduates.pdf.

11. BUREAU OF LABOR STATISTICS, FIRST QUARTER (2005) (reporting the statistics for the sixteen year old and over population only).

12. Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*).

that profoundly impacted the decision itself, and equally as important, would frustrate the desegregation remedies prescribed. As the late Roy Wilkins described, the states "insisted and wove into a smothering pattern a thousand different personal humiliations, both public and private, based upon color."[13] The purpose of this Article is to illuminate how the *Brown* decisions—flawed in themselves—had to overcome that "smothering pattern" of racism and discrimination in areas beyond the courts' equitable and temporal reach. In sum, *Brown* proved to be no match for rank racism, unchecked political power, judicial capitulation, housing segregation and even interstate highway construction policies.

Part One of this Article examines the *Brown* decisions and the aftermath. Part Two revisits the desegregation saga post-*Green v. County School Board of New Kent County, Virginia*,[14] and the subsequent political and judicial forces which would doom desegregation efforts. Part Three examines the role that suburbanization and interstate highway transportation policies contributed to the frustration of desegregation efforts. This Article concludes by positing that in the context of modern public school reform, the promise of *Brown* is still elusive due to proposed legislative solutions, which once again, marginalize the interests of African-Americans.

II. WHAT *BROWN* DID NOT DO

A. Brown I *as a Triumph of Racial Restorative Justice? Well, Not Quite*

Certainly, there has been plenty of justifiable praise for *Brown*'s impact. It has been described in almost mythic terms, noted as "a defining moment in American history,"[15] and is credited for the growth of the black middle class.[16] Many more, however, have cast sobering eyes to-

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13. NATHANIEL R. JONES, A PERSONAL REFLECTION ON THE IMPORTANCE AND MEANING OF THE UNITED STATES SUPREME COURT DECISION IN *BROWN V. BOARD OF EDUCATION* 96 (2004). The late Roy Wilkins starkly described the state of our nation before *Brown*: "Through legal and extra-legal machinery, through unchallenged political power, and through economic sanctions, a code of demeaning conduct was enforced and cast down on children, before they could dream, and eroded manhood after they came of age." *Id.*

14. 391 U.S. 430 (1968).

15. SYMPOSIUM, *Fifty Years After Brown v. Board: Five Principles for Moving Ahead*, 6 AFR.-AM. L. & POL'Y REP. 242 (2004); SYMPOSIUM, *Fifty Years After Brown v. Board: Five Principles for Moving Ahead*, 11 ASIAN L.J. 324 (2004); SYMPOSIUM, *Fifty Years After Brown v. Board: Five Principles for Moving Ahead*, 15 BERKELEY LA RAZA L.J. 115 (2004); SYMPOSIUM, *Fifty Years After Brown v. Board: Five Principles for Moving Ahead*, 19 BERKELEY WOMEN'S L.J. 443 (2004).

16. Constance Baker Motley, *Reflections on Justice Before and After* Brown, 32 FORDHAM URBAN L.J. 101, 108 (2004) ("Yet the Supreme Court's decision half a century ago

ward its legacy. Derrick Bell has remarked upon *Brown*'s "unassertive and finally failed implementation" because it did not boldly rebuke the likelihood that Whites were only going to abide by desegregation remedies that converged with their interests, if at all.[17] In a similar vein, Charles Ogletree observed that the *Brown II*'s "with all deliberate speed" directive was a bow to White resistance to desegregation and ensured that *Brown* would never be "implemented as a social imperative."[18] Professor Lani Guinier, reflecting upon *Brown*, noted that the decision allowed to continue, "uninterrupted," White America's compulsion to use race as a scapegoat, which ultimately led to our re-stigmatization.[19] Gary Orfield commented that the *Brown* holding would have been remembered as a failure, but for the civil rights movement.[20] Still others have placed the current racial disparities in academic achievement, as well as the re-segregation of public school systems throughout the country, squarely on the shoulders of African-Americans.[21]

Questions and recriminations surrounding *Brown's* impact have by no means been isolated to ivory towers. *Brown* has been re-evaluated in churches, classrooms, the basketball courts, barbershops, and street corners. In those discussions, there is little need to cite statistics on academic achievement, racial disparities, or re-segregative patterns. On a daily basis, those people bear witness to the failed academic achievements of their sons, daughters, and neighbors' children, despite their best efforts. They watch their children board buses, on a milk route to a dilapidated

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has generated a black middle class by opening higher education to African-Americans, and has demonstrated that the law can align itself with rather than merely enforcing the predilections of majority rule-makers.").

17. DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 196 (2004) (stating also that the language of the opinion "lifted the spirits of blacks" and "led to public support and congressional action that might not otherwise have occurred for some time").

18. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 306 (2004).

19. Interview by Tavis Smiley with Lani Guinier, Harvard Professor (May 10, 2004) ("*Brown* essentially allowed that understanding to continue uninterrupted. So you had enormous white backlash to *Brown* because many poor working-class whites saw *Brown* and saw desegregation as downward economic mobility . . . .").

20. GARY ORFIELD & SUSAN EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1996).

21. *See, e.g.*, JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA 3, 83 (2000) (arguing that African-Americans do not do poorly in school because of racism, but instead have "a virus of [a]nti-intellectualism that infects the black community," by adopting and exaggerating victimhood as identity); RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994) (examining the role of heredity ethnic and racial groups differences in intelligence).

school across town into an overcrowded classroom with outdated resources and overworked teachers. Their daily life experiences tell them all they need to know: something just is not right. Given the moral and legal triumph that *Brown* represented, our lives, and the educational opportunities for our children, should be much better.

So what happened? Without doubt, the *Brown* decision was a triumph in restorative justice, offering all African-Americans a vindication of sorts. The opinion acknowledged what we at the time knew all along: that "separate" was *never* "equal," but *always* "less;" and that "separate" was never anything more than a racist construct expressly designed and maintained to stamp African-Americans with an indelible badge of inferiority. With the *Brown* decisions, this particular Jim Crow doctrine had finally been exposed as the most opprobrious, fallacious paradigm ever enforced in a society that considered itself civilized. That no less an authority than the Supreme Court had finally determined that African-Americans children deserved nothing short of an education equal to that afforded white children was reason to rejoice. The *Brown* decision provided hope for something that could never, ever, be obtained under a de jure segregated system.

The crime of racism and its various incarnations have been well-demonstrated, but atonement by the perpetrators had been long in coming. Even the Emancipation Proclamation failed to vanquish all the tools employed to commit the crime (the shackle, the bit, the whip, the pyre, the noose, the law), as we would witness with the invigoration of the Ku Klux Klan and Jim Crow laws. As *Plessy v. Ferguson*[22] infamously sanctioned continued use of those laws (and outlaws) for another fifty years, the *Brown* decision represented justice long denied for African-Americans.

Unanimously rebuking the *Plessy* "separate but equal" doctrine, the *Brown I* court, in six words—"[s]eparate educational facilities are inherently unequal"—overruled half a century of a sorry legacy.[23] By ruling that separate public accommodations in K-12 education were "obnoxious to the fourteenth amendment,"[24] the Supreme Court in *Brown I* finally did what it hinted toward sixteen years before.[25] Until 1954, if any Su-

22. 163 U.S. 537 (1896).

23. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (*Brown I*).

24. Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) ("[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable . . . .").

25. Gaines v. Canada, 305 U.S. 337, 351 (1938) (holding a state must provide comparable facilities for legal education for African-Americans where they have such facilities for Whites); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948) (finding that a state institution could not deny admission to an applicant based solely upon the applicant's

preme Court decision could fairly be characterized as a bombshell to the wall of segregation, the *Brown I* opinion was indeed that—one which blew segregation's resilient bricks out of their mortar.[26]

Invoking the metaphor of war is apt. As widely acknowledged, the *Brown* decision was in part a response to circumstances beyond the schoolhouse: the defeat of Nazism and Communism.[27] For the United States, "segregation posed a contradiction for the self-proclaimed exemplar of freedom and democracy."[28] On the heels of a World War II victory, and in the throes of a still-existing Communist threat, the Supreme Court—indeed our entire country—was confronting a shameful moral contradiction: how was it that we could fight on behalf of others to live free from oppressive regimes while America continued to confer no rights to African-Americans that were equally obvious.[29] The importance of moral consistency in the global context was not lost on President Truman, or the Supreme Court.[30] That argument proved to be a powerful weapon in Thurgood Marshall's rhetorical arsenal. Through the *Brown I* opinion, political leaders were able to claim a degree of moral superiority that had previously criticized the discriminatory practices permitted in the United States.[31]

When viewed in this light, one can see how *Brown I* was not an uncompromised moral triumph. The decision raised the distressing notion that, to banish Jim Crow from public education, it would be insufficient to solely rely upon the *inherent* immorality of racial segregation and discrim-

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race); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950) (reversing the lower court and holding that an institution of higher learning which creates seating assignments based upon race in the classroom, library and cafeteria deprives the plaintiff of his right to equal protection of the laws); Sweatt v. Painter, 339 U.S. 629 (1950) (finding that the "educational opportunities offered [to] white and Negro law students . . . were not substantially equal").

26. DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 21–28 (2004) (arguing that the Supreme Court should have upheld *Plessy* and, alternatively, directed districts to ensure that schools were equally resourced).

27. *Id.* at 59.

28. *Id.* at 60.

29. *See Plessy*, 163 U.S. 537 (1896).

30. Brief for the United States as Amicus Curiae, Brown v. Bd. of Educ., 75 S. Ct. 753 (1952); (Nos. 8, 101, 191, 413, 448) DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 66 (2004).

31. DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 66–67 (2004) (quoting President Truman pleading that "if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy"). "In addition, the Supreme Court was acutely aware of the nation's need to protect its national security against those who would exploit our internal difficulties for the benefit of external forces." *Id.*

ination. Desegregation required an appeal to the nationalistic interests of those in power to achieve justice for African-Americans.[32] Cynically, it makes one wonder whether we should be grateful that there were some Whites who hated communism slightly more than they hated the idea of integration.

B. Brown II *as a Triumph of Racial Restorative Justice? Absolutely Not*

> *"What one hand giveth, the other hand taketh away."*
> —Proverb

Overruling *Plessy* was just the beginning of the end of de jure segregation in public education. The questions next became: How were the governmental entities—school districts, state and local bodies—going to go about eliminating the dual systems of education? What did it mean to "desegregate?" And when would desegregation have to occur? A year after its *Brown I* decision, the Supreme Court gave its "wholly unassertive" reply in *Brown II*.

In doing so, what the Supreme Court gave in *Brown I*, it took away in *Brown II*. Yielding to a fear of massive white resistance, the Supreme Court softened the potential impact of its *Brown I* pronouncement with a phrase that would have a devastating impact. The Court cited the need to give weight to "public and private considerations," and the "elimination of a variety of obstacles" to implement its desegregation order.[33] The elimination of those obstacles "in a systematic and effective manner" required taking "into account the public interest[.]"[34] Consequently, the Supreme Court blinked, directing school boards to admit students "to public schools on a racially nondiscriminatory basis" not *at once*, but "*with all deliberate speed.*"[35]

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32. *Id.* at 49 (moving the author's "interest convergence" theory through the arc of the United States civil rights history by illuminating the point that even African-Americans' most evil sufferings "have been insufficient, standing alone, to gain real relief from any branch of government"). In fact, only when "policymakers perceive that such advances will further interests that are their primary concern" did African-Americans gain civil rights advancements. *Id.*

33. Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (*Brown II*), ("To effectuate this interest [of nondiscriminatory admission into public schools] may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our [previous] decision . . . . While giving weight to these public and private considerations, the courts will require that the [school boards] make a prompt and reasonable start toward full compliance with our [previous] ruling.").

34. *Id.* ("Courts of equity may properly take into account the public interest in the elimination of . . . obstacles in a systematic and effective manner.").

35. *Id.* at 301 (emphasis added) ("The judgments below . . . are accordingly reversed and remanded [to] . . . enter such orders and decrees consistent with this opinion as are

This textual reading of *Brown II* provides the persuasive premise of Professor Ogletree's hypothesis, and confirms Professor Bell's interest-convergence theory. The remedy prescribed in *Brown II* would not be "pure," but only one that accommodated majority interests. With those four words, Marshall and others sadly recognized which "public" Chief Justice Warren meant when he said public interest: Whites resistant or hostile to integration. They also knew that the "obstacles" of which Warren spoke were largely those de jure and de facto anti-black systems which had been woven, by that "public," into every conceivable aspect of American life. The greatest "obstacle," of course, was the endemic racism of white resistance that would not be cowed by judges who had "substituted their personal political and social ideas for the established law of the land."[36] As Professor Ogletree recounts, events unfolding over the next decade would define what Chief Justice Warren failed to articulate in *Brown II*. "[A]ll deliberate speed" meant change would come slowly, cautiously, warily,[37] and at a pace dictated by whites.[38]

C. *"Nullification and Interposition" Throughout the South*

> I have a dream that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of 'interposition' and 'nullification'— one day right there in Alabama little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers. I have a dream today!
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> —Reverend Dr. Martin Luther King, Jr.[39]

The Reverend Doctor Martin Luther King, Jr. saw it, and called it what it was. The "all deliberate speed" directive amounted to a "white pass,"

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necessary and proper to admit to public schools on a racially and nondiscriminatory basis with all deliberate speed the parties to these cases.").

36. Southern Manifesto, 102 CONG. REC. 4515–16 (1956) (documenting the members of Congress in 1956 who opposed racial integration in public places. It had ninety-six signatories, all from Southern states. The Manifesto was drafted to counter the *Brown* ruling).

37. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 310 (2004) (noting that the Court's order to integrate with "all deliberate speed" has been very deliberate, but not very speedy).

38. Alexander v. Holmes County Bd. of Educ., 396 U.S. 1218, 1219 (1969) (quoting Justice Black). "Unfortunately this struggle has not eliminated dual school systems, and I am of the opinion that so long as that phrase is a relevant factor they will never be eliminated. 'All deliberate speed' has turned out to be only a soft euphemism for delay." *Id.*

39. Martin Luther King, Jr., I Have a Dream, Speech Delivered at the Lincoln Memorial (Aug. 28, 1963), *available at* http://www.americanrhetoric.com/speeches/mlkihaveadream.htm.

enabling contrary school districts, authorities, politicians, and the courts to effectuate *Brown* on their own terms—terms that denoted passive resistance, delay, avoidance, obfuscation, and in too many instances, violence. This says nothing of the *Brown* plaintiffs' sufferings: threatened, fired from their jobs, unable to secure loans and financing, or arrested on spurious charges.[40] To be sure, in the years following *Brown II*, resistance to integration, famous and infamous, was legion, unfolding at a pace and with a ferocity that—figuratively and literally—stopped hearts.

In 1955, NAACP leader Reverend George Wesley Lee of Belzoni was murdered, as was Florida's NAACP President and his wife.[41] Sixteen-sticks of dynamite outside of his bedroom window sent the Reverend Fred Shuttleworth through the floor and into the basement of his Birmingham home on December 25, 1956; he survived this one of several attempts to take his life.[42] Within the first four years of the *Brown I* decision, there were reportedly "530 cases of overt racial violence and intimidation - including 6 murders, 29 shootings, 44 beatings, 5 stabbings and the bombings of 30 homes, 7 churches, 4 synagogues and 4 schools. In the tense battle over desegregation, 17 southern towns were threatened with mob violence."[43] At the federal, state, and local levels, politicians met the Supreme Court's decision with bold-faced contempt. George Wallace's vitriolic invocation—"[S]egregation today! Segregation

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40. RICHARD KLUGER, SIMPLE JUSTICE (1977) (chronicling the history of the individuals involved in the litigation leading to and including the *Brown* decisions).

41. B.R. Brazeal, *Some Problems in the Desegregation of Higher Education in the "Hard Core" States*, 27 J. NEGRO EDUC. 352, 355, 365 (1958).

42. Fred Shuttlesworth, *He Pushed Martin Luther King Jr. into Greatness,* 2001 J. BLACKS IN HIGHER EDUC. 61, 61 (2001). At that time, Reverend Shuttlesworth was the Chairman of the Membership Committee for the Alabama NAACP. *Id.*

43. John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFFALO L. REV. 653, 684 (1994).

> It must be noted that the *Brown* decisions came at the apex of the Montgomery bus boycott, whose successes led to malevolent reprisals by the Ku Klux Klan and other racists, and further fueled white resentment to the *Brown* victories. *Id.* "Segregationist resentment expressed itself in other potentially lethal forms. Two days after the inauguration of desegregated seating, someone fired a shotgun through the front door of King's home. A day later, on Christmas Eve, white men attacked a black teenager as she exited a bus. Four days after that, two buses were fired upon by snipers. In one sniper incident, a pregnant woman was shot in both legs. Then, on January 10, 1956, bombs destroyed five black churches and the home of Reverend Robert S. Graetz, one of the few white Montgomerians who had publicly sided with the [Montgomery Improvement Association]."

Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1055 (1989).

tomorrow! Segregation forever!"[44] stands today as a chilly, emblematic testament to the intense defiance. The NAACP was outlawed from operating in Alabama by a circuit court judge's order in 1956.[45] One hundred United States legislators from southern states vowed to "resist forced integration by any lawful means."[46] Those legislators endorsed a "Southern Manifesto" which decried the Supreme Court's "abuse of judicial power."[47] Governor Orval Faubus asserted that Arkansas was not bound by *Brown*, posting guardsmen at the doors of Little Rock's Central High School to prevent entry of African-American students.[48] The Gray Commission of Virginia was established by the governor to study methods by which to keep the schools separate.[49] Both Delaware and Texas legislatures passed laws stating that no child could be compelled to attend a racially mixed school,[50] as did nineteen other legislatures.[51]

Southern anti-integrationists found their outlets to oppose *Brown* through organizations such as the Mississippi White Citizens Council and the Mississippi Sovereignty Commission, the latter whose state-sanctioned charge was "to do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Mississippi, and her sister states, from encroachment thereon by the federal government or any branch, department or agency thereof[.]"[52]

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44. George C. Wallace, Inaugural Address of Governor of Alabama in Montgomery, Ala. (Jan. 14, 1963).

45. B.R. Brazeal, *Some Problems in the Desegregation of Higher Education in the "Hard Core" States*, 27 J. NEGRO EDUC. 352, 353 (1958).

46. Southern Manifesto, 102 CONG. REC. 4515–16 (1956) (being sponsored by Strom Thurmond of South Carolina, Harry Byrd of Virginia, and Richard Russell of Georgia, stating strong opposition to forced integration). "We regard the decisions of the Supreme Court in the school cased as a clear abuse of judicial power." *Id.* "With the gravest concern for the explosive and dangerous condition created by this decision and inflamed by outside meddler [,]. . . [w]e commend the motves of those States which have declared the intention to resist forced integration by any lawful mean." *Id.*

47. *Id.*

48. RICHARD KLUGER, SIMPLE JUSTICE 753–54 (1977); Robert P. George, *Lincoln on Judicial Despotism*, FIRST THINGS, Feb. 2003, at 36–40; Cooper v. Aaron, 358 U.S. 1 (1958) (rebuking Governor Faubus in holding that the *Brown* decisions were binding on all states).

49. Verna L. Williams, *Reading, Writing, and Reparations: Systemic Reform of Public Schools as a Matter of Justice*, 11 MICH. J. RACE & L. 419, 462 (2006) (establishing a goal to circumvent the *Brown* decisions by passing laws specifically devised to undermine the Supreme Court's decision to integrate schools).

50. The History of Jim Crow: Jim Crow Laws—Texas, http://www.jimcrowhistory.org/scripts/jimcrow/insidesouth.cgi?state=Texas (last visited Jan. 12, 2007).

51. Susan Falck, Jim Crow Laws: Legislation Overview 3, http://www.jimcrowhistory.org/resources/lessonplans/shs_es_jim_crow_laws.htm (last visited Jan. 12, 2007).

52. The History of Jim Crow: Jim Crow Laws—Texas, http://www.jimcrowhistory.org/scripts/jimcrow/insidesouth.cgi?state=Texas (last visited Jan. 12, 2007).

School boards were also defying *Brown* with impunity. Across the South, districts delayed integration through "pupil placement plans," requiring a school board's permission if African-American students requested a transfer. Invariably, African-American students requesting transfer were found to be "unfit," and were therefore denied.[53] While state administrators in Virginia, South Carolina, and Georgia threatened to close their schools if made to integrate,[54] one particular district made good on the threat. Rather than admit African-American children, education officials in Prince Edward County, Virginia concluded that *no* child—whether white, black, brown, yellow, green, blue or purple—would be educated within its public school walls.[55] The county shut down its entire public school system for five years, during which time the state subsidized the creation of "private" schools for Whites.[56]

By May 1964, southern states had enacted 450 laws and resolutions to frustrate the *Brown* decision.[57] It was little wonder, then, a year after Dr. King stirred the nation's soul and conscience, only one out of fifty southern African-American school-age children attended integrated schools.[58]

III. ONE STEP FORWARD, TEN STEPS BACK

A. *Removing Vestiges Root and Branch*

"Until the violation has been cured."
—Ted Shaw, NAACP

It was not until 1964 when a confluence of social, political, and legal forces resulted in a tidal wave breaking down the barriers of continued de jure and de facto school segregation. Beginning with the Civil Rights Act, federal legislation became a critical tool to aid proponents of deseg-

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53. ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION 190 (2003) (noting school districts' desegregation policies and "pupil placement plans").

54. Gabriel G. Chin et al., Univ. of Ariz., Still on the Books: Jim Crow and the Segregation Laws Fifty Years After *Brown v. Board of Education* 8–9 (Apr. 5, 2004), *available at* http://law.arizona.edu/jimcrow/files/JimCrowReport.doc (revealing that in southern states, including South Carolina and Georgia, the state governor's gave authority to schools via legislation to close if integrated); The *Brown* Decision in Norfolk, Va., http://www.littlejohn explorers.com/jeff/brown/resistance.htm (last visited Jan. 12, 2007) (stating that the school planned to close if African-Americans seek enrollment).

55. Edward H. Peeples, Jr., Prince Edward County: The Story Without an End (July 1963) (unpublished thesis, Virginia Commonwealth University), http://www.library.vcu.edu/jbc/speccoll/pec03a.html).

56. *Id.*

57. CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 53 (2004).

58. BLACK ISSUES IN HIGHER EDUCATION, The Unfinished Agenda of *BROWN V. BOARD OF EDUCATION* 53 (2004).

regation. Perhaps appropriately seen as the "backlash to the backlash,"[59] one of the Act's many accomplishments was the reinvigoration of a desegregation movement that *Brown* and its judicial progeny had, until that time, been unable to yield. A year later, the Voting Rights Act would be passed, marking another milestone in the quest for political and legal rights. The Fair Housing Act of 1968 sought to address what was becoming the primary barrier to desegregation: housing discrimination. Further, the Emergency School Aid Act of 1972 sought to provide financial assistance to local school districts in developing human relations and educational initiatives. Taken together with other statutory directives and executive orders, anti-segregation and discrimination efforts were significantly advanced.

In addressing discrimination, *Brown II* made explicit what was only implicit in *Brown I*. After *Brown I* first declared *segregation* unconstitutional,[60] *Brown II* expanded that dictate, declaring "that racial *discrimination* in public education is unconstitutional."[61] *Brown II*'s dictate meant not "merely" integrating the schools, but identifying, then eliminating the very touchstones, or indicia, of racial discrimination within the public school systems.[62] However, for all of the legislative momentum, it was not until 1964 that the Supreme Court reasserted itself.

Nine years after *Brown II*, the Supreme Court proclaimed that "[t]he time for mere 'deliberate speed' has run out."[63] It was four years after that, in *Green v. County School Board of New Kent County, Virginia,*[64]

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59. Cass R. Sunstein, *Did* Brown *Matter?: On the Fiftieth Anniversary of the Fabled Desegregation Case, Not Everyone Is Celebrating*, NEW YORKER, May 3, 2004, at 102.

60. Susan Falck, Jim Crow Laws: Legislation Overview 3, http://www.jimcrowhistory.org/resources/lessonplans/hs_es_jim_crow_laws.htm (last visited Jan. 12, 2007). At the time of the *Brown* decision, de jure segregation did not exist nationwide. The following states required segregation: Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *See id.* While in these states segregation is permitted in varying degrees: Arizona, Kansas, New Mexico and Wyoming. Segregation prohibited: Colorado, Connecticut, Idaho, Illinois, Iowa, Indiana, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Washington and Wisconsin. *See id.* Finally, in these states no specific legislation regarding segregation existed: California, Maine, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, South Dakota, Utah and Vermont. *See id.* Of course, this is not to say that those states without de jure segregation laws did not enforce other Jim Crow laws, or enforce other segregationist measures. *See id.*

61. Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955) (*Brown II*) (emphasis added).

62. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 434 (1968).

63. Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 234 (1964) (describing how the ruling in *Brown II* was designed to ensure broader protection outside of desegregation).

64. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968).

the Supreme Court ordered school districts under desegregation plans to identify *any* policy or practice "traceable to the prior *de jure* system of segregation" that "continue[d] to have discriminatory effects."[65] Once identified, remedies were now bound to address "not just . . . the composition of student bodies . . . but . . . every facet of school operations."[66] The *Green* decision empowered those who sought broad remedies to eradicate the *discrimination* that impacted public schools and the education of African-American children. Emboldened plaintiffs set out to eliminate all vestiges of de jure segregation "root and branch."[67]

Predictably, racial discrimination impacting school segregation could be found virtually everywhere: faculty and staff hiring; training and retention; establishing school district boundary lines; distribution of education expenditures; student discipline; special education placement; physical plant conditions; educational achievement and opportunities for students in reading, math, science, communication, and other curricular fundamentals; vocational education placement, counseling and career guidance; extra- and co-curricular activity support; school transportation; employment; and especially in housing.[68] By identifying the "hard" and

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65. *See* United States v. City of Yonkers, 833 F. Supp. 214, 218–19 (S.D.N.Y. 1993) ("A vestige of segregation is a policy or practice which is traceable to the prior *de jure* system of segregation and which continues to have discriminatory effects.").

66. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 435 (1968).

67. *Id.* at 438. While many school districts outside of the South were taking voluntary and involuntary efforts to desegregate, it was not until 1972 that the Supreme Court made such efforts imperative for districts outside of the South. Keyes v. Denver Sch. Dist., 413 U.S. 189 (1973).

68. *See, e.g.*, Liddell v. Missouri (*Liddell III*), 731 F.2d 1294, 1314 (8th Cir. 1984) (for a discussion on effective school projects); Berry v. Sch. Dist. of Benton Harbor, 515 F. Supp. 344, 369 (W.D. Mich. 1981); Kelley v. Metro. County Sch. Bd., 511 F. Supp. 1363, 1368–70 (M.D. Tenn. 1981); United States v. Bd. of Comm'rs, Indianapolis Sch. Bd., 506 F. Supp. 657, 673 (S.D. Ind. 1979); Tasby v. Estes, 412 F. Supp. 1192, 1217 (N.D. Tex. 1976); Milliken v. Bradley (*Milliken II*), 402 F. Supp. 1096, 1143–44 (E.D. Mich. 1975); United States v. Texas, 342 F. Supp. 24, 30, 33–34 (E.D. Tex. 1971). See *Evans v. Buchanan*, 582 F.2d 750, 770–71 (3d Cir. 1978) (en banc), *cert. denied*, 446 U.S. 923 (1980); *Indianapolis Sch. Bd.*, 506 F. Supp. at 672; *Tasby*, 412 F. Supp. at 1207, 1220; *Milliken II*, 402 F. Supp. at 1139; *United States v. Texas*, 342 F. Supp. 24, 33–34 (E.D. Tex. 1971) for discussions on the training institute and staff development. See *Liddell III*, 731 F.2d at 1317; *Milliken II*, 402 F. Supp. at 1119, 1145; *Berry*, 515 F. Supp. at 382–84; *Indianapolis Sch. Bd.*, 506 F. Supp. at 673; *Tasby*, 412 F. Supp. at 1206, 1220–21; Morgan v. Kerrigan, 401 F. Supp. 216, 248–49, 268–69 (D. Mass. 1975), *aff'd*, 503 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976) for a discussion on management information system and equity compliance. See *Berry*, 515 F. Supp. at 376; *Tasby*, 412 F. Supp. at 1219–20; *United States v. Texas*, 342 F. Supp. at 30; Redman v. Terrebonne Parish Sch. Bd., 293 F. Supp. 396, 380 (E.D. La. 1967); Hill v. Lafourche Parish Sch. Bd., 291 F. Supp. 819, 823 (E.D. La. 1967) for discussions on affirmative action. See *Liddell III*, 731 F.2d at 1310; *Berry*, 525 F. Supp. at 365–66; *Kelley*, 511 F. Supp. at 1370; *Milliken II*, 402 F. Supp. at 1146–47; *Morgan*, 401 F. Supp. at 235, 246–47 for discussions on magnet schools. See *Tasby*, 412 F. Supp. at 1217; *Morgan*, 401 F. Supp. at

"soft" indicia of school segregation and discrimination, courts belatedly began to use their equitable powers to demand broad remedies. Consequently, between 1966 and 1975, 523 school districts had desegregated.[69] Ultimately, these gains would be short-lived, as politicians, housing discrimination, suburbanization, and federal interstate highway plans would hinder efforts to achieve *Brown*'s goals.

B. *"Root and Branch": Too Little, Too Late*

"Southern White Democrats will desert their party in droves the minute it becomes a black party."
—Kevin Phillips, campaign strategist to Richard Nixon, 1967[70]

As quickly as the Supreme Court stepped in to accelerate the pace of desegregation, another backlash brewed. Particularly, the implementation of busing plans caused white citizens from Los Angeles to Boston to violently defy desegregation orders. It was during this time that Americans saw the image which came to symbolize the rank anti-black hatred: attorney Theodore Landsmark, outside of Boston City Hall, being held by a White man as another man attacks him with the spire of the pole waving the American Flag.[71]

More insidiously, President Richard Nixon stepped in to hasten the retreat. His hostility to busing well-documented,[72] Nixon set out to challenge and stall desegregation orders, part of his overall "Southern Strategy" for Republicans to claim—once and for all—the southern vote.[73] He fired Leon Panetta, his Assistant Secretary of Health, Educa-

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252; *United States v. Texas*, 342 F. Supp. at 36 for a discussion on special education or testing. *See, e.g.*, *Milliken II*, 402 F. Supp. at 1118, 1140–41 (discussing vocational or technical education). See *Evans*, 582 F.2d at 771; *Berry*, 515 F. Supp. at 373–74; *Indianapolis School Board*, 506 F. Supp. at 672; *Morgan*, 401 F. Supp. at 234; *Milliken II*, 402 F. Supp. at 1118, 1143–44; *United States v. Texas*, 342 F. Supp. at 30–34 for a discussion on curriculum and instruction. See *Evans*, 582 F.2d at 771–72; *Milliken II*, 540 F.2d at 250; *Berry*, 515 F. Supp. at 379–81; *Indianapolis Sch. Bd.*, 506 F. Supp. at 672; *Tasby*, 412 F. Supp. at 1219 for a discussion of student discipline. See *Milliken II*, 402 F. Supp. at 1144; *Tasby*, 412 F. Supp. at 1217; *Morgan*, 401 F. Supp. at 252; *United States v. Texas*, 342 F. Supp. at 30–34 for a discussion on bilingual education. See *Liddell III*, 731 F.2d at 1317; *United States v. Texas*, 342 F. Supp. at 38 for a discussion on methods of evaluation.

69. CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 26 (2004).

70. Lawrence J. McAndrews, *The Politics of Principle: Richard Nixon and School Desegregation*, 83 J. NEGRO HIST. 187, 188 (1998).

71. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 306 (2004) (using photography by Stanley Forman from 1977).

72. Lawrence J. McAndrews, *The Politics of Principle: Richard Nixon and School Desegregation*, 83 J. NEGRO HIST. 187, 188 (1998).

73. *Id.* at 188.

tion, and Welfare, for his aggressive pursuit of desegregation.[74] In *Swann v. Charlotte-Mecklenburg School District*,[75] Attorney General John Mitchell explained that the Nixon Administration "supported Charlotte in principle, in that we are taking the position that the Fourteenth Amendment does not require racial integration as a matter of law."[76] After the *Swann* decision, which ordered a busing desegregation remedy, Nixon signed legislation stopping all busing until all appeals had been filed, or the appeal times had lapsed.[77]

Nixon then trained his eye upon Supreme Court appointments. In addition to his appointment of Harry Blackmun and William Rehnquist, Nixon also appointed Lewis Powell, Jr. to the Supreme Court with the expressed hope that he would be instrumental in "eliminat[ing] busing and decelerat[ing] housing desegregation efforts."[78] Powell did not disappoint; his presence on the high court proved pivotal in two of the most devastating anti-desegregation decisions ever issued. Powell's vote was dispositive in the *Milliken v. Bradley*[79] decision, which held that an interdistrict, urban-suburban Detroit, Michigan busing remedy to achieve racial balance was unconstitutional.[80] The Supreme Court's rejection of urban-suburban remedies ensured that Detroit and other metropolitan school districts–especially in northern cities–could only watch helpless as the districts tipped toward minority-majority composition. *Milliken* also ensured that it would be only a matter of time when northern school districts would throw up their hands and argue the impossibility of *Brown*, and for the release from desegregation orders.

In another decision, *San Antonio Independent School District v. Rodriguez*,[81] Powell wrote for the 5-4 majority, reversing the district court finding that Texas' property tax-school funding mechanism violated the Equal Protection Clause.[82] Holding that there was neither a constitutional right to a public education nor financial equalization,[83] it would take twenty

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74. *Id.*

75. 402 U.S. 1 (1971).

76. Lawrence J. McAndrews, *The Politics of Principle: Richard Nixon and School Desegregation*, 83 J. NEGRO HIST. 187, 190 (1998)

77. *Id.* at 191.

78. GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 27 (1996).

79. Milliken v. Bradley, 418 U.S. 717 (1974) (*Milliken I*); Milliken v. Bradley, 433 U.S. 267 (1977) (*Milliken II*).

80. *Milliken I*, 418 U.S. at 752–53.

81. 411 U.S. 1 (1979).

82. *Id.* at 8.

83. GARY ORFIELD & SUSAN EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 11–12 (1996).

years and two more iterations of school finance litigation to only partly nullify *Rodriguez's* impact.

Ronald Reagan continued the assault on desegregation started by Nixon to solidify the white southern Democratic base. After refusing an invitation to speak before the National Association for the Advancement of Colored People at its annual convention, Reagan instead went to Philadelphia, Mississippi—the town made infamous by the murders of Goodman, Cheney, and Schwerner at the height of the civil rights movement—to kick off his presidential campaign, and extol the virtues of "state's rights."[84] In 1981, he rescinded the Emergency School Aid Act, which had documented success at supporting desegregation remedies, and attempted to eliminate Desegregation Assistance Centers.[85] The head of his Department of Justice Civil Rights Division, William Reynolds,[86] also hostile towards school desegregation and busing, set about dismantling those efforts.[87] Finally, it was Reagan's Supreme Court appointees, Kennedy, O'Connor, and Scalia, and Bush's appointment of Thomas who ensured the end of all court-ordered desegregation plans owed to the *Brown* decisions.[88]

As the causal connection between de jure segregation and present vestiges became more attenuated, the increasingly conservative Supreme Court would begin to ensure that court-ordered desegregation—regardless of successes or failures—would come to a halt. In *Missouri v. Jenkins,*[89] the Supreme Court set time limits on equalizing funding. *Freeman v. Pitts*[90] limited equitable remedies, and held that districts would not have to show correction of all violations as a condition of finding unitary status.[91] Finally, in *Oklahoma v. Dowell,*[92] even though the Oklahoma City School District had not met all of the goals set out in the desegrega-

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84. JACK W. GERMOND & JULES WITCOVER, BLUE SMOKE & MIRRORS: HOW REAGAN WON & WHY CARTER LOST THE ELECTION OF 1980 (1981). Reagan's August 3, 1980 speech was delivered almost to the day on what would be the sixteenth anniversary of the day on which the bodies of Goodman, Cheney, and Schwerner were found. *Id.*

85. GARY ORFIELD & SUSAN EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 16 (1996). Although Reagan did not succeed in the latter, Congress did reduce funding of such centers, resulting in a seventy-five percent decrease in the number of centers during Reagan's term. *Id.* at 17.

86. Reynolds later became Assistant Solicitor General under Reagan.

87. GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 17 (1996).

88. *Id.* at 27.

89. 515 U.S. 70 (1995) (holding that requiring continuation and increased funding of remedial education programs is beyond the power of the federal courts).

90. 503 U.S. 467 (1992) (discussing the remedies available to alleviate segregation in public schools).

91. GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 27 (1996).

tion order, the Supreme Court affirmed the dissolution of the desegregation order. The school board promptly voted to return to segregated neighborhood schools. With this, "the Supreme Court exhumed some of *Plessy*'s basic assumptions,"[93] *viz.*, segregated schools would be a reality again, but with no assurance that they would be equal.

IV. HOUSING DISCRIMINATION, SUBURBANIZATION AND THE GREAT AMERICAN HIGHWAY

A. *Housing Discrimination as a Barrier to School Integration*

"'*You might have the cash, but you can . . . not cash in your face[;] we don't want you livin' in here!!*"
—Stevie Wonder[94]

Without argument, housing discrimination played a fatal role in *Brown*'s undoing. The McMichael's Appraising Manual, originating in the early 1930's, was the leading residential appraisal guide for decades. The manual provided the blueprint upon which housing discrimination would be institutionalized, rank-listing racial groups from least- to most-desirable.

1. Mexicans
2. Negroes
3. South Italians
4. Russians, Jews (lower class)
5. Greeks
6. Lithuanians
7. Poles
8. Czechs or Bohemians
9. North Italians
10. English, Germans, Scotch, Irish, and Scandinavians[95]

Real estate appraisers used this manual, and its odious gauge of racial worth, at least into the 1950's.[96] The manual's impact began taking shape in 1933 when it was adopted by President Roosevelt's Homeowners Loan

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92. 498 U.S. 237, 248 (1991) (holding that desegregation orders do not operate in perpetuity).

93. GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 27 (1996).

94. STEVIE WONDER, *Cash in Your Face*, on HOTTER THAN JULY (Jobete Music/Black Bull Music, Motown 1980).

95. Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 622 n.35 (1999) (noting that the list purported to rank ethnic groups according to their effect on property values).

96. *Id.* (citing MCMICHAEL'S APPRAISING MANUAL 160 (1951)).

Corporation program to provide homeowner financial assistance during the Great Depression. Two governmental engines that drove housing finance development over the next sixty years further institutionalized and perpetuated racist housing practices. The Federal Housing Administration (the FHA), established in 1934, financed surburbanization beyond World War II. Along with the Veteran's Administration (established in 1944), the FHA sought to encourage lenders to invest in residential lending through the provision of insurance.[97] Their underwriting guidelines were cribbed directly from the McMichael's manual, directing "that properties shall continue to be occupied by the same social and racial classes,"[98] and warned against introducing "inharmonious racial groups" into neighborhoods.[99]

It was not until 1950 that the FHA officially altered this policy. However, it still "recommended suitable restrictive covenants."[100] This was so despite the fact that the Supreme Court declared such covenants unconstitutional in *Shelly v. Kraemer* in 1948.[101] Redlining became rampant, and "by the late 1950's many blacks were denied access to traditional sources of housing finance by institutionalized procedures."[102] Through the 1960's, government housing policies continued to perpetuate segregation, especially as suburban growth took off. Until 1962, federally-sponsored public housing works were classified for occupancy by race, and even after that, city officials went to great lengths to keep housing projects out of white neighborhoods.

Though measures such as the Fair Housing Act, the Home Mortgage Disclosure Act, the Community Reinvestment Act and the Equal Credit Opportunity Act were enacted as responses to housing discrimination and economic flight, they came too late for *Brown*. The incipient government housing programs and policies "put a seal of approval on ethnic and racial discrimination,"[103] and were eventually adopted non-governmental actors. However, those adopting the government's racist practices took those practices to another level, and to the suburbs. Banks, real estate agents, mortgage brokers and appraisers would transform redlining into a

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97. *Id.* at 626.

98. *Id.*

99. DOUGLAS A. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 51–52 (1993).

100. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 191–92 (1985).

101. 334 U.S. 1 (1948).

102. Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 627 (1999).

103. *Id.*

science, carving up cities by race with a precision that would put heart surgery to shame.

B. *No Whites to Integrate: Suburbanization's Role in Undoing Brown*

"We shall solve the city problem by leaving the city."
—Henry Ford[104]

In the 1950's and 1960's, suburban population increased from 35 million to 84 million. The so-called "urban crisis" accelerated this migration. School desegregation, racial strife, crime, increasing social services costs and taxes hastened the migration of white families to the suburbs.[105] By 1980, 100 million people lived in suburbs.[106] Henry Ford's words, in the context of school desegregation efforts, proved prophetic.

As whites left the city, African-Americans continued to move into the cities. During the post-World War II era and into the 1970's, the migration of poor, southern African-Americans to the north changed cities dramatically. Between 1960 and 1970 alone, central cities lost 1.92 million whites, and gained 2.8 million African-Americans.[107] As a result, for those cities under desegregation orders, achieving the racial balance was becoming impossible,[108] in short, because there were no whites to integrate.[109]

With white flight came economic flight. In the post-segregation era, suburbs enjoyed unprecedented industrial and commercial growth. According to a 1968 study, between 1954 and 1963, the United States' 40 largest cities lost nearly 26,000 manufacturing jobs, while suburbs gained almost that exact amount.[110] By 1980, suburban employment went from 14 million to 33 million jobs.[111] To be sure, many African-Americans moving into the cities, "found no work, and instead, faced discrimination and economic deprivation."[112]

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104. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 191–92 (1985).

105. Mark Baldassare, *Suburban Communities*, 18 ANN. R. SOC. 474, 477 (1992).

106. *Id.*

107. Yale Rabin, *Highways as a Barrier to Equal Access*, THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI., May 1973, at 65.

108. *See* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 206–18 (2004).

109. DOUGLAS A. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 51–52 (1993).

110. Yale Rabin, *Highways as a Barrier to Equal Access*, THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI., May 1973, at 66 (citing John F. Kain's study "The Distribution and Movement of Jobs and Industry").

111. Mark Baldassare, *Suburban Communities*, 18 ANN. R. SOC. 474, 477 (1992).

112. *Id.* at 480.

Public mass transportation policy exacerbated the economic plight of inner-city African-Americans, who disproportionately lacked access to suburbs and the emerging job opportunities.[113] The distance to suburban employment "imposed unreasonable costs burdens of centrally located blacks, and [ ] public transit . . . was badly oriented for traveling from the ghetto to outlying centers of employment."[114] However, it was in the same year as *Brown I* that another transportation initiative was born which would serve an underappreciated role in undermining desegregation efforts.

C. *The Federal Highway System's Role in Keeping Schools Separate and Unequal*

"As often happens with interstate highways, the route selected was through the poor area of town, not through the area where the politically powerful people live."
—Justice William O. Douglas[115]

The Federal Highway Transportation Act of 1956[116] was first proposed by President Eisenhower in 1954 and shepherded by Lucius Clay, then Chairman of General Motors. Over the following three decades, construction of federal highways would do more than just hasten the economic demise of inner cities by facilitating white flight and economic flight to the suburbs.[117] Those highways also tore apart inner-city neigh-

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113. Gilbert Paul Verbit, *The Urban Transportation Problem*, 142 U. PENN. L. REV. 368, 379, 380 (1975) ("[E]xisting transit facilities serve mainly suburban residential areas and do not provide access to job sites in the suburbs") (noting the comparatively higher growth rate of new jobs in the suburbs versus those in the inner city); *see also* Yale Rabin, *Highways as a Barrier to Equal Access*, THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI., May 1973, at 68 (discussing how transportation policy and interstate construction made it easier for *access to* the inner-city from the suburbs rather than *access from* the inner-city to the suburbs).

114. Yale Rabin, *Highways as a Barrier to Equal Access*, THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI., May 1973, at 68.

115. Triangle Improv. Council v. Ritchie, 402 U.S. 497, 502 (1971) (Douglas, J., dissenting) (emphasis added) (pointing out how the interstate highway projects at issue disproportionately affect the elderly and many low income households, already severely displaced by other related public projects).

116. *See generally* The Federal Highway Transportation Act of 1956, 23 U.S.C.A. § 139 (2005) (replacing The Federal-Aid Highway Act of 1956). The Federal-Aid Highway Act outlines the environmental review process for proposed projects and highlights the Department of Transportation and state and local governments' obligations to provide the public with an opportunity to participate in defining a project's purpose and need. *Id.*

117. Michael E. Lewyn, *The Urban Crisis: Made in Washington*, 4 J.L. & POL'Y 513, 538 (1996) (adding that new highways also drove retailers and businesses out of the city); *see also* Daniel T. Lichter & Glenn V. Fuguitt, *Demographic Response to Transportation Innovation: The Case of the Interstate Highway*, 59 SOC. FORCES 492, 509 (1980) (pointing

borhoods, resulting in the destruction of millions of homes and countless inner-city communities.[118] In Kansas City, Missouri, for example, the South Midtown Freeway, for which planning began in the 1960's, was built through a section of the city that, in 1980, had over 122,000 African-American residents.[119] In Columbus, Ohio, the Interstate 670 spur was built through a neighborhood that was between 50% and 90% African-American.[120]

In Nashville, Tennessee, Interstate 40 "swings suddenly in a wide loop, avoiding the downtown area, but passing north through what was once the center of Nashville's black community."[121] That is because, in order to build the interstate in 1971, twenty-seven apartments and 626 residences were leveled. Moreover, buildings used by 128 African-American businesses, three community colleges, and one-third of north Nashville's park facilities were destroyed.[122] Finally, at the dawn of the Interstate age, and hard on the heels of the *Brown* decisions, Detroit's oldest established African-American neighborhood, the historic Black Bottom, was bulldozed to make way for Interstate 75.[123]

Furthermore, federal highways built through the poorest neighborhoods lowered residential property values already artificially devalued by racially discriminatory housing practices. Until recently, virtually every state relied upon local property tax values and assessments to finance public K-12 education. As urban districts became poorer on average, and

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out that interstate highways not only promote economic growth and migration, but also influence changes in trade and service areas). "Being located on an interstate highway is positively related to employment growth in each of the three industrial employment classifications [manufacturing, non-local services, and tourist related employment]. *Id.* at 504–05 t.3.

118. Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 316 (2000) (listing numerous examples of African-American families' homes and communities being destroyed).

119. Kevin Fox Gotham, *Political Opportunity, Community Identity, and the Emergence of a Local Anti-Expressway Movement*, 46 SOC. PROBS. 332, 341 (1999).

120. Coal. of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 113–14 (S.D. Ohio 1984).

121. Note, *In the Path of Progress: Federal Highway Relocation Assurances*, 82 YALE L.J. 373, 373 (1972).

122. *Id.* Apparently, an alternative to this route was rejected by the White business community. *Id.* at 373 n.2.

123. DETROIT RIOTS – 1967, http://www.67riots.rutgers.edu/d_index.htm. The Black Bottom was so named not because of those who lived there, but because of the soil. *Id.* The history of residential segregation in Detroit is well-documented, and distressingly infamous. *Id.* For example, during the 1940s and 1950s White Detroiters' sought to block the entry of African-Americans into their neighborhoods by legal and extra-legal means, in one instance building a six-foot high, one-foot wide concrete wall along Eight Mile Road, to separate themselves from potential African-American neighbors. *Id.*

experienced drops in residential property values as well as revenue from businesses, inner-city school districts were receiving disproportionately less monies per pupil.[124] Consequently, public school financing would suffer a crippling crisis.[125]

Thus, the interstate highway system served a triple blow to *Brown*: 1) it continued and reinforced residential segregation; 2) it enabled business and industry to leave the inner-city; and 3) it caused a lower yield for inner-city property tax assessments. But for the Supreme Court's rejection of Detroit's urban-suburban desegregation remedy, much of the damage wrought by housing discrimination and highway construction could have been mitigated. For whites, however, the "city problem" had been solved—they left the city, insulated by suburban discriminatory housing practices and *Milliken* from having to be under the edict of school desegregation orders.[126] The most aching paradox is the fact that Lucious Clay was the chief engineer of one tool (the highway), and heir to another tool (the car)[127] that enabled the white flight from Detroit, and necessitated the urban-suburban remedy in *Milliken* in the first place.[128]

V. AND ONE THOUSAND AND MORE: THE POWER OF SUBURBAN INTERESTS AND THE CURRENT STATE OF PUBLIC EDUCATION REFORM

"You don't have to live next to me—just give me my equality"
–Nina Simone, Mississippi Goddam[129]

It has long been clear that public schools would not achieve racial integration envisioned by *Brown*. The persistence of racism, the political and judicial retreat, suburbanization, transportation policy, and the inability to effectively combat the re-segregation of the inner cities have driven

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124. *Cf.* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 267–68 (2004) (stating generally that highways lower property values in relation to school funding).

125. Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 627 (1999).

126. Although it cannot be said that Henry Ford meant his statement to be a reference to the racial ills of the city, it is nonetheless apropos.

127. *See generally* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 174–76 (1985).

128. *Id.* From 1947 to 1963, Detroit lost 134,000 jobs. In ten years, from 1946 and 1956, General Motors spent $3.4 billion on new plants, Ford spent $2.5 billion, and Chrysler spent $700 million. In that span, they opened twenty-five auto plants—all in Detroit's suburbs.

129. NINA SIMONE, MISSISSIPPI GODDAM (Warner/Chappell Music, Phillips Records 1963).

advocates of education reform for African-Americans to explore new solutions. Public school finance reform, school vouchers, and "pupil choice" plans are currently being tested and evaluated. However, three facts about the current state of school finance reform do not bode well for the legacy of *Brown*: 1) current reforms are being led by state legislatures; 2) those legislatures are controlled by suburban interests;[130] and 3) suburban constituents and legislators are, at best, ideologically opposed to ensuring the most fundamental mandates of education reform as it regards African-American public school students.[131] Consequently, as we see happening today, those legislators most compelled to protect the interests of inner city (and largely minority) students will be marginalized in legislative outcomes.[132]

Voucher and school choice programs were once hailed as a solution to not only enhancing the education opportunities for African-Americans, but also as a means of achieving something that could not be done by *Brown* and its progeny: meaningful racial integration. However, even under these programs, suburban school districts have been successful in staving off meaningful integration.[133] Since racial integration is not achievable, initiatives now focus on ensuring adequate school funding.

Funding equalization has been the focus of several state class action suits challenging public school financing methodologies—methodologies which have had the effect of under-funding minority and/or poor school districts. As a result of court orders, now legislatures in 45 states have been directed to address these inequities.[134] However, by the very nature of legislative institutions, political ideology, legislative party control, majority/minority ratios, and the inherent complexities of legislator roles and approaches will impact school finance reform inputs and outcomes.[135]

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130. Bryan Adamson, *The Haint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173, 181–82 (2006) (using Ohio as an example).

131. *Id.* at 184.

132. *Id.* at 193.

133. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2059 (2002) (referring to "the most remarkable feature of school finance litigation is that even successful challenges have not led to equal funding, nor have any of the suits done much to alter the basic structure of school finance schemes").

134. Bryan Adamson, *The Haint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173, 178 (2006).

135. *Id.* at 185–188. It has been well documented that Whites view school finance reform through racial lenses. *See, e.g.*, James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 475 (1999); Douglas S. Reed, *Twenty-Five Years After* Rodriguez: *School Finance Litigation and the Impact of the New Judicial Federalism*,

What is more, legislative majorities in several states have trended towards suburban interests, and consequently favors those most opposed to school finance adequacy which would best benefit inner cities. The debate over school finance adequacy, as a result, has at times taken on unsettling racial subtext.[136] In response to court-ordered finance reform mandates, legislators have decried the "activist judges" "imposing" their will upon the people; the "trashing of the separation of powers"[137] or taking away "local control."[138] Suburban legislator and constituent resistance to finance reform have been most vociferous in states in which class actions were led by minority plaintiffs and school districts.[139] The specific objection lies in the raced perception that urban (read: minority) school districts stand to benefit from school finance reform, with no apparent benefit to suburban (read: white) school districts.[140] Consequently, the rhetoric and resistance evokes disturbing reminders of post-*Brown* defiance of integration orders.

Where suburban politicians direct legislative inputs, processes and outcomes, solutions most effective in addressing the needs of minorities in public education funding are likely to be elusive.[141] Those in control most strongly opposed to meaningful reform which is court-directed, demands taxation as a means to provide more financial resources, threatens local control, or results that solely or disproportionately benefit inner-city school districts.[142] True reform will require a legislative collective that is ideologically, socially, morally, and fiscally committed to remedying the problem. Unfortunately, once again, we hear little about moral imperative to remedy the unforgivable racial disparities in public education systems, only of solutions which are palatable to majoritarian interests.

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32 L. & SOC'Y REV. 175, 211 (1998). It is also well documented that, in the last 10 years, state legislatures have been dominated by the rise in suburban legislators, as citizens move out of the cities. As the ideological and racial make-up of legislators closely follow their constituents, policy inputs and outcomes on school finance reform will reflect the predominating suburban interests. *See* Bryan Adamson, *The Haint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173, 201 (2006).

136. Bryan Adamson, *The Haint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173, 179 (2006) (discussing Ohio as an example).

137. *Id.* at 182.

138. *Id.* at 193–94.

139. *Id.* at 186–88.

140. *Id.*

141. Bryan Adamson, *The Haint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173, 201 (2006).

142. *Id.* at 184.

VI. CONCLUSION

"Even the smallest victory is never to be taken for granted. Each victory must be applauded, because it is so easy not to battle at all, to just accept and call that acceptance inevitable."
–Audre Lorde

No measure of a court's equitable power, no measure of a government's dismantling of de jure barriers, no number of buses could solve what James Baldwin and others have seen as our nation's core moral failing: racism. *Brown* set the stage for dismantling racism, segregation, and discrimination in public school systems. However, addressing the racism, segregation, and discrimination in politics, suburbanization, housing, and transportation policy went unabated for too long, and frustrated the ability of *Brown*'s edict to be wholly fulfilled.

Though we recently commemorated the fiftieth anniversary *Brown*, reflection is still warranted. For many, that reflection invites a profound sense of disappointment in light of the promise *Brown* signaled for African-Americans, educational achievement, and racial integration. However, as the history of *Brown* makes painfully clear, courts "cannot produce social reform on its own, and [ ] judges are unlikely to challenge established social consensus."[143] Given that the issue of educational achievement for African-Americans has shifted to the statehouses across the country, the same can be said of legislators.

Today, with the benefit of hindsight, we can all reflect upon the *Brown* decisions and implementations with an arched eyebrow of skepticism. To the extent that skepticism has transformed itself into disappointment, it is worth considering that perhaps, just *perhaps*, our expectation for what *Brown* could achieve for African-Americans was outsized, or at least, misplaced. What we *hoped* for was not necessarily what *Brown promised.* While *Brown* set us "on the path of rejecting the kind of racial exclusion that had made African Americans a people apart since before the nation's founding,"[144] *Brown* could not break through that smothering pattern of a thousand humiliations beyond courts' reach.

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143. Cass R. Sunstein, *Did* Brown *Matter?: On the Fiftieth Anniversary of the Fabled Desegregation Case, Not Everyone Is Celebrating*, NEW YORKER, May 3, 2004, at 102.

144. ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION*: Caste, Culture, and the Constitution 241 (2003).